

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   STATE FARM MUTUAL AUTOMOBILE       :

4   INSURANCE COMPANY,                 :

5                   Petitioner                 :

6                 v.                                 :   No. 01-1289

7   INEZ PREECE CAMPBELL AND             :

8   MATTHEW C. BARNECK, SPECIAL         :

9   ADMINISTRATOR AND PERSONAL         :

10   REPRESENTATIVE OF THE ESTATE       :

11   OF CURTIS B. CAMPBELL.               :

12   - - - - -X

13   Washington, D. C.

14   Wednesday, December 11, 2002

15                 The above-entitled matter came on for oral

16   argument before the Supreme Court of the United States at

17   11:04 a.m.

18   APPEARANCES:

19   SHEILA L. BIRNBAUM, ESQ., New York, New York; on behalf of

20                 the Petitioner.

21   LAURENCE H. TRIBE, ESQ., Cambridge, Massachusetts; on

22                 behalf of the Respondents.

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1 P R O C E E D I N G S

2 (11:04 a.m.)

3 JUSTICE STEVENS: We'll hear argument in Number  
4 01-1289, State Farm Mutual v. Campbell and others.

5 MS. BIRNBAUM, you may proceed whenever you're  
6 ready.

7 ORAL ARGUMENT OF SHEILA L. BIRNBAUM

8 ON BEHALF OF THE PETITIONERS

9 MS. BIRNBAUM: Thank you, Justice Stevens, and  
10 may it please the Court:

11 This case arose from a single failure by State  
12 Farm to settle a third party automobile case in the State  
13 of Utah within the policy limits of its insured in Utah.

14 There was evidence in the record, uncontroverted  
15 evidence, that this was the only case in the State of Utah  
16 where a policyholder of State Farm had been subject to  
17 potentially a threat of execution on a judgment. All of  
18 the other judgments that were in excess of policy limits,  
19 which there were seven of in the State of Utah over a 14-  
20 year period, including both before and after  
21 Mr. Campbell's case --

22 QUESTION: Ms. Birnbaum, may I ask you a  
23 question about the record?

24 MS. BIRNBAUM: Yes, Your Honor.

25 QUESTION: As I understand the other side, what

1 is at issue is a policy that your company had over the  
2 years, I forget the name of it, BP and something or other,  
3 and I looked for that policy in the record, and I couldn't  
4 find it. Is it in the record? Is there a written --

5 MS. BIRNBAUM It's in the lodging, Your Honor.

6 QUESTION: It's a lodging?

7 MS. BIRNBAUM It's at 1506 to 1531 in the  
8 lodging, and if you look at the B, so-called PP&R -- it's  
9 called the Performance Planning and Review Manual -- it is  
10 a guide. It is a personnel evaluation guide on how to  
11 evaluate personnel, and it applies to all, all the  
12 personnel of State Farm, all thousands of personnel, and  
13 what the plaintiff did was to cherry-pick from this long  
14 manual which is in the lodging, as I said, one or two  
15 points that didn't even apply to claims adjustors or  
16 claims representatives, but to supervisors, to try to  
17 create this pervasive nationwide scheme that there was an  
18 attempt by State Farm over 20 years to lessen the claims  
19 that they were paying and not pay the fair value of  
20 claims.

21 QUESTION: Nonetheless, if the jury found such a  
22 policy, that there was a policy as alleged by the  
23 plaintiff, that's not -- we have to take that as a given,  
24 don't we, Ms. Birnbaum?

25 MS. BIRNBAUM You may have to take that as a

1 given, Your Honor, but the question becomes, how is that  
2 policy related in any way to this decision to try a case  
3 in the State of Utah, and how can State Farm be punished  
4 for its nationwide conduct, when all this case was about,  
5 and should have been about --

6 QUESTION: Do you say the evidence of conduct in  
7 other jurisdictions should have been excluded, it was  
8 inadmissible?

9 MS. BIRNBAUM Your Honor, some evidence should  
10 have come in under this Court's determination in BMW to  
11 show reprehensibility, but evidence that could have come  
12 in to show reprehensibility had to be comparable to the  
13 conduct that was at stake here.

14 QUESTION: Well, what do you say to the argument  
15 on the other side that the instances of conduct involving  
16 facts having nothing to do with settlement within policy  
17 limits, all came in, in effect as rebuttal, as admissible  
18 rebuttal evidence in response to issues that State Farm  
19 raised?

20 MS. BIRNBAUM Your Honor, the record is replete  
21 in our opening brief. We cite to the many times all of  
22 this evidence came in on direct, of the plaintiff's  
23 experts and the plaintiff's so-called fact experts.  
24 That's a makeshift argument. This didn't just come in.  
25 This was a 2 and month trial on -- and most of that trial

1 was geared to this nationwide scheme.

2 And more importantly, if you look at what the  
3 Utah Supreme Court said in reinstating this incredibly  
4 excessive verdict, 145 to 1, when you look at that, it is  
5 very clear that the Utah Supreme Court was looking at a  
6 national scheme.

7 QUESTION: Well, yes, that may be. I mean, I  
8 think there's no question it was looking at a national  
9 scheme. The question is whether our gripe, or your gripe  
10 is with the Utah Supreme Court or with the case as it was  
11 tried, and I take it your answer to my question is, there  
12 was evidence going to practices having nothing to do with  
13 settlement within policy limits that did come in without  
14 any relationship to rebuttal at all.

15 MS. BIRNBAUM That's exactly right, Your Honor.

16 QUESTION: Okay.

17 MS. BIRNBAUM And it's all cited in our brief,  
18 in our opening brief, many, many times.

19 QUESTION: And why doesn't --

20 QUESTION: And were objections made each time?

21 MS. BIRNBAUM Your Honor, there was not,  
22 because that wasn't necessary in the State of Utah. If a  
23 litigant objects in limine to the introduction of this  
24 evidence, which was done --

25 QUESTION: That was done.

1 MS. BIRNBAUM That was many times done, and  
2 Your Honor, when this case came down with the case of BMW  
3 v. Gore, there was an oral argument made that that kind of  
4 evidence was unconstitutional under Gore, because it was  
5 dissimilar and extraterritorial.

6 QUESTION: Ms. Birnbaum, why doesn't it go to  
7 reprehensibility if it were true that this failure to  
8 settle claims that were quite valid was simply part of a  
9 nationwide pattern to pay out less than was due, not just  
10 in this context but in every context? Why doesn't that go  
11 to reprehensibility?

12 MS. BIRNBAUM Because, Your Honor, if we are --  
13 if we permit litigants to create this overriding scheme  
14 that you are engaged in fraud in all your business  
15 practices, and that you can be punished for that, it is as  
16 if in Gore --

17 QUESTION: Well, I think it does go to  
18 reprehensibility if we're giving some kind of an ethical  
19 report card to State Farm

20 MS. BIRNBAUM Your Honor --

21 QUESTION: It does not go to reprehensibility, I  
22 would think would be your point, as to the harm suffered  
23 by this plaintiff.

24 MS. BIRNBAUM Absolutely.

25 QUESTION: And that seems to me the difference.

1 MS. BIRNBAUM Absolutely. Your Honor --

2 QUESTION: You say it would go to  
3 reprehensibility, and it would go to the harm suffered by  
4 this plaintiff, if they introduced evidence of doing the  
5 same thing to other plaintiffs in other States, the same  
6 thing to other plaintiffs. How does that go to the harm  
7 to this plaintiff?

8 MS. BIRNBAUM Well, Your Honor --

9 QUESTION: You know, I don't understand how you  
10 can possibly say you cannot introduce evidence from other  
11 States, and at the same time say, unless it's introduced  
12 to show reprehensibility.

13 Once you say you're allowed to introduce it for  
14 reprehensibility, I don't know why all of this doesn't go  
15 to show that State Farm is more reprehensible.

16 MS. BIRNBAUM Your Honor, because in Gore v.  
17 BMW this Court, the majority of this Court held that you  
18 can introduce on the reprehensibility question similar  
19 conduct that compares to the conduct that occurred to the  
20 particular plaintiff in the underlying case.

21 QUESTION: Of course, that's all that was  
22 offered in Gore, of course.

23 MS. BIRNBAUM But that -- but Your Honor, it  
24 would be like --

25 QUESTION: So we didn't really have to reach



1 your question in that case.

2 MS. BIRNBAUM Your Honor, but it would be like  
3 in Gore saying that there was a plan to maximize profits,  
4 and that not only could you introduce and consider the  
5 repair issues that occurred in Gore, but you could also  
6 show that there was discrimination against minority  
7 customers, that there was --

8 QUESTION: But the answer is that all that does  
9 go to reprehensibility. It does. A person who commits  
10 this conduct and is part of a company that engages in all  
11 kinds of bad action is a person who is somewhat more  
12 reprehensible than if you worked for a company that  
13 doesn't engage in all this bad action, but I thought your  
14 point was that that's true, but unless you draw a line  
15 like the line that was drawn in Gore, you are inviting a  
16 jury to punish the company for all kinds of things that  
17 truly do make them more reprehensible, but without  
18 standards, without a legislature telling them how  
19 reprehensible, et cetera.

20 MS. BIRNBAUM I couldn't have said it any  
21 better, Your Honor.

22 (Laughter.)

23 QUESTION: Well then, maybe -- maybe you can  
24 tell me how one defines reprehensibility so that it only  
25 includes what you call the same acts. Maybe you can tell

1 me. That's what gives me the trauma, and you say not  
2 different acts. What is different acts? It has to be  
3 something --

4 MS. BIRNBAUM Well, I think --

5 QUESTION: -- other than a policyholder who --  
6 you know, who passed five, six cars on the highway?

7 MS. BIRNBAUM No. No, you have --

8 QUESTION: Why isn't cheating all policyholders  
9 in all contexts, paying less than they're entitled to, why  
10 isn't that similar to what happened here?

11 MS. BIRNBAUM Because it had nothing to do with  
12 what happened here, and I'd like to explain to you. Maybe  
13 it's a little -- but what happens in third party and first  
14 party cases, in this particular case there was a decision  
15 to go to trial. Why was that decision made to go to  
16 trial? Because at least the lawyers for State Farm in  
17 some of the claims represented felt this was a no  
18 liability case. Mr. and Mrs. Campbell said that they were  
19 not liable, that they didn't cause this accident. This  
20 wasn't a no-brainer. There was evidence. The jury  
21 decided on other evidence.

22 But when you bring into this equation 20 years  
23 of conduct that, some of it that is lawful, this wasn't  
24 only fraudulent conduct. This jury heard and was  
25 instructed -- not instructed, but in the summation there

1 was references to the payment of non-OEM, the  
2 specification of non-OEM parts, was perfectly legal in  
3 almost every jurisdiction.

4 QUESTION: How would you formulate the standard  
5 that you want us to adopt, the standard which confines the  
6 reprehensibility evidence to what you deem to be  
7 appropriate in a case such as this?

8 MS. BIRNBAUM I think --

9 QUESTION: What rule do we have?

10 MS. BIRNBAUM I think, Your Honor, the proper  
11 reprehensibility inquiry is limited to an examination of a  
12 defendant's specific misconduct toward the plaintiff and  
13 similar conduct by the defendant toward others, but it has  
14 to be similar. This was not similar conduct requiring --

15 QUESTION: And here you're not drawing a line --  
16 one of the lines was similar conduct and in the same  
17 State, but in the automobile, automobiles, we're a very  
18 mobile society, so I don't think -- well, perhaps you are,  
19 but you said this is, we draw a line around Utah, but  
20 suppose the driver who was insured by State Farm was from  
21 California, or from New York, where you get more than  
22 seven incidents out of 14 years?

23 MS. BIRNBAUM But the question here was, was  
24 there a bad faith failure to settle? That is the conduct.  
25 If there was evidence of bad faith failure to settle in

1 other States, that could come in on reprehensibility.  
2 That could inform the jury in some way, and under BMW v.  
3 Gore, you said that that kind of conduct, similar conduct  
4 in BMW was identical conduct.

5 QUESTION: Well then, then you have no concern  
6 with punishing for acts that took place out of State?

7 MS. BIRNBAUM No, I --

8 QUESTION: You're abandoning that, or --

9 MS. BIRNBAUM We have not gotten to the ratio  
10 of the comparable penalties questions under BMW. We were  
11 just focusing on reprehensibility.

12 QUESTION: What is similar conduct in BMW, to  
13 give some feel for what you mean by similar conduct?

14 MS. BIRNBAUM Exactly what the Court --

15 QUESTION: Selling cars with scratches on them,  
16 or is it selling -- what about, you sell cars with  
17 defective, knowingly, with defective clutches? Would that  
18 be similar?

19 MS. BIRNBAUM No, it would not.

20 QUESTION: It would -- it has to be cars with  
21 scratches, it has to be the same thing?

22 MS. BIRNBAUM It's the conduct --

23 QUESTION: Wow.

24 MS. BIRNBAUM It was the conduct that occurred  
25 in that case. In that case there was a failure to tell

1 consumers --

2 QUESTION: The car had a scratch.

3 MS. BIRNBAUM -- that the car had a --

4 QUESTION: So the only cases that are relevant

5 are other cases where BMW pawned off cars that had

6 scratches? It could pawn off all sorts of other defects,

7 but not scratches?

8 MS. BIRNBAUM If you open it up to all kinds of

9 other defects, then you're opening it up --

10 QUESTION: You lose, right.

11 MS. BIRNBAUM You're opening it up --

12 (Laughter.)

13 MS. BIRNBAUM -- to the kind of thing that can

14 happen here, especially if it gets punished. In this case

15 there was a million dollars' worth of compensatory

16 damages, a substantial number, and this verdict was 145

17 times that. That could only be considered because it was

18 punishing all of this extraterritorial, dissimilar, and in

19 many instances, lawful conduct.

20 QUESTION: I thought we had just gotten off the

21 extraterritorial -- where you said it wouldn't make any

22 difference if the insured was from California or from

23 Utah.

24 MS. BIRNBAUM That's exactly right, Your Honor.

25 The really important thing here is that the Utah

1 Supreme Court --

2 QUESTION: Excuse me. I don't understand where  
3 we are on the out of State. You say you're going to get  
4 to that under another --

5 MS. BIRNBAUM Yes.

6 QUESTION: -- prong?

7 MS. BIRNBAUM Under ratio and comparable  
8 penalties, Your Honor. Because this Court has said that  
9 you could introduce extraterritorial conduct, similar,  
10 past conduct with regard to reprehensibility, but there  
11 are three guideposts in Gore, and the Utah Supreme Court  
12 ignored the other two guideposts. Of course, when it came  
13 to the ratio guidepost, this Court has repeatedly said  
14 there has to be a reasonable relationship, reasonable  
15 ratio between the penalty, the punishment, and the harm to  
16 the plaintiff: not the harm to others, not the harm to the  
17 community at large, not the harm to all of the consumers  
18 that dealt with State Farm, as the Utah Supreme Court held  
19 and found, and --

20 QUESTION: So how do we measure that? How do we  
21 measure the ratio, the reasonable relationship of the  
22 penalty?

23 MS. BIRNBAUM Here, Your Honor, there was a  
24 compensatory damage award of a million dollars. That was  
25 a substantial compensatory award. The ratio that would be

1 reasonable with regard to a million dollars could not be  
2 145 to 1.

3 QUESTION: Except that, you know, we say that  
4 you can't take into account harm to others, but you can  
5 take into account harm to others so long as that is done  
6 under the rubric of reprehensibility.

7 MS. BIRNBAUM As long --

8 QUESTION: If you've done the same thing to  
9 other people, you can be punished more. Now, you may find  
10 a significant difference between punishing you for what  
11 you did to the other people, and punishing you more for  
12 what you did to this person, because it is rendered more  
13 reprehensible because of what you did to other people, but  
14 I don't see a whole lot of difference between the two.

15 MS. BIRNBAUM But even if there is a ratio,  
16 what reprehensibility does is put you on the continuum of  
17 blameworthiness, and this Court has said previously that 4  
18 to 1 is close to the line. In TX0 it permitted 10 to 1  
19 because economic damages was small, and you looked at  
20 potential harm as well as the realized harm to the  
21 litigant there.

22 Here, he had substantial compensatory damages.  
23 In addition, if you look at the third guidepost in Gore,  
24 you have comparable penalties and sanctions for comparable  
25 conduct. That's how that is defined.

1           What was the conduct here? It was a failure to  
2 settle within policy limits. It wasn't intentional tort;  
3 it was --

4           QUESTION: May I just suggest an analogy? This,  
5 in a way this reminds me of the argument we heard last  
6 week -- maybe it was last session -- about the three  
7 strikes law in California; that you're not necessarily  
8 punished for the other things you did, but you can take  
9 into account your prior crimes even in other States in  
10 order to justify a more severe penalty for what you've  
11 done here. And isn't it -- part of the argument the other  
12 side makes is that this is a very large company, and the  
13 board of directors doesn't hear about a \$100-million  
14 punitive damage award down in Texas, and therefore you've  
15 got to at least give them enough money so the board of  
16 directors will know they ought to take corrective steps.

17           MS. BIRNBAUM: Could I just first answer this  
18 \$100 million punitive damage award, because I think that  
19 really shows where the Utah Supreme Court is going. There  
20 was no judgment. This had nothing to do with bad faith  
21 failure to settle. It had to do with an uninsured  
22 motorist coverage. The case was settled for pennies on  
23 the dollar. There was no --

24           QUESTION: 99 cents?

25           (Laughter.)



1 MS. BIRNBAUM Pennies. Pennies. Unfortunately  
2 I couldn't put into evidence the amount because there as a  
3 confidentiality agreement, but that case had nothing to do  
4 with the kind of conduct here. You cannot --

5 QUESTION: No, but I suppose to the extent it's  
6 relevant it is, that you need an awfully big award against  
7 an awfully big company, because you want the company  
8 itself to take corrective steps, and if this \$100 million  
9 award isn't even called to the attention of the board of  
10 directors, maybe that says you needed a larger award than  
11 would otherwise be justified.

12 MS. BIRNBAUM Your Honor, I think if you look  
13 at this, this was a jury award that was never made into a  
14 judgment. Why would anybody -- it was settled. It was a  
15 runaway verdict in a place. Why would anybody go to the  
16 board of directors with something like that?

17 QUESTION: Okay, let's assume the \$100 million  
18 had never happened.

19 MS. BIRNBAUM Okay.

20 QUESTION: The argument as made is, this is a  
21 company with a surplus in, literally measured in the  
22 billions. You've got to have a really big judgment to get  
23 their attention. What's your response?

24 MS. BIRNBAUM The answer to that is, first of  
25 all, surplus was the wrong number to ever focus on. That

1 money is accounted for, and there are some very good  
2 briefs, amicus briefs that talk about surplus.

3 There was never a profit from underwriting in  
4 this particular instance, and the fact that the company  
5 has surpluses, that's to pay out claims.

6 QUESTION: That's just saying how rich they are.  
7 I mean, the question -- whether they're rich or not, they  
8 seem quite rich, but maybe they're not, but the harm here  
9 was what? Is he had a \$50,000 policy.

10 MS. BIRNBAUM Yes.

11 QUESTION: And he for a period of time the  
12 client thought that he'd have to pay \$136,000 out of his  
13 own pocket, for how long a period of time?

14 MS. BIRNBAUM There is a question in the  
15 record. The trial court said that it was for a short  
16 period of time. The Utah Supreme Court said it was for 18  
17 months.

18 QUESTION: All right, so for 18 months he's  
19 frightened that he'll have to pay \$136,000 out of his own  
20 pocket, all right. Now, because of that fright, he was  
21 given a million dollars in compensation and another \$145  
22 million -- I don't know, how much went to him? How much  
23 went to the lawyers?

24 MS. BIRNBAUM Well, Your Honor, there would be  
25 40 percent that would go to the lawyers --

1 QUESTION: So --

2 MS. BIRNBAUM -- and under the agreement the --

3 QUESTION: \$56 million goes to the lawyers.

4 MS. BIRNBAUM Right.

5 QUESTION: And how much went to him? How much

6 went to him?

7 MS. BIRNBAUM 10 percent of the award was --

8 QUESTION: All right, so \$14 million went to

9 him, and where did the rest go?

10 MS. BIRNBAUM It went to the two other

11 plaintiffs in the original case.

12 QUESTION: Okay. Now, that's all necessary for

13 the follow -- or at least not necessary, reasonable for

14 the following reason. This is a very big company, and

15 unless you really make them pay they might do this again,

16 or if not this, something equally bad, okay?

17 Now, what's your response?

18 MS. BIRNBAUM The response to that, Your Honor,

19 is there's nothing in this record -- first of all, that

20 kind of ratio is totally unreasonable and out of

21 proportion to the harm to the plaintiff.

22 QUESTION: That's not my question. My question

23 is, there is a claim Even if it's out of proportion to

24 the harm, we've got to wake these people up at State Farm

25 Now, they get wakened up by this 145 million judgment,

1 believe me, and --

2 MS. BIRNBAUM Yes. There's no question of  
3 that.

4 QUESTION: All right. Now -- all right. Now,  
5 what's your response to that, that's a very desirable or  
6 necessary thing, or they might do it again?

7 MS. BIRNBAUM It's not a necessary thing on  
8 this record, it is not a desirable thing. There was no --

9 QUESTION: Because?

10 MS. BIRNBAUM There was no evidence in this  
11 record that there was any other case in which there had  
12 been a failure to settle within policy limits that  
13 jeopardized an insuree --

14 QUESTION: All right, suppose there had been 10  
15 cases in which 10 other people were frightened of having  
16 to pay \$136,000 for a period of 18 months. Then, in your  
17 opinion, would it have been justified to enter this  
18 judgment of \$145 million to wake them up? Indeed, at 4  
19 month intervals they kept doing this over and over.

20 MS. BIRNBAUM Your Honor, if that happened,  
21 then each one of those plaintiffs could have a bad faith  
22 failure to settle claim in which they could have gotten  
23 punitive damages in their own States. There is no -- this  
24 whole concept that this is a clandestine scheme, every --

25 QUESTION: Maybe no amount of money will

1 suffice. Maybe we have to send them to jail.

2 MS. BIRNBAUM Well, that's what --

3 (Laughter.)

4 MS. BIRNBAUM That's what the Supreme Court of  
5 Utah said, even though it's not in their statute. Can you  
6 imagine, on fair notice, when we talked about fair notice,  
7 that you could go to jail for a failure to settle one case  
8 in the State of Utah?

9 QUESTION: This jury --

10 QUESTION: It didn't have authority to send them  
11 to jail though, did it?

12 MS. BIRNBAUM No, they didn't.

13 QUESTION: You know, but you're making -- I  
14 think you're making two arguments. First, you're making  
15 the argument that you started with, and that is, evidence  
16 was improperly admitted, acts in other States were  
17 improperly considered, acts unlike failure to settle were  
18 improperly considered.

19 Let's assume, for the sake of argument, that you  
20 lose -- I mean, if you win on that, I presume we're not  
21 going to get to the point you're arguing now. Let's  
22 assume you lose on that. You get to the point that you're  
23 arguing now and you say, okay, 4 times the amount of  
24 actual damage would be okay, 145 is not. What do we put  
25 in an opinion to indicate what is the proper point in

1    between 4 and 145?

2                   MS. BIRNBAUM   I think you've already put that  
3    in your opinions in this Court already, and that is that  
4    there has to be a relationship between the amount of the  
5    punitive damages and the compensatory harm to the  
6    plaintiff.

7                   QUESTION:   Yes, I know that, and the question  
8    is, is 4 times the relationship appropriate, and 145 is  
9    not? And how about 80, and 60, and 20? How do we grapple  
10   with that?

11                  MS. BIRNBAUM   Well, I think you grapple with  
12   that only by looking at the three guideposts that you've  
13   already put forth, and it could be 4, it could be 5, and  
14   some courts have even held 10, but most of the courts that  
15   have followed your jurisprudence have held that 3, or 4,  
16   or 5 is close to the line.

17                  QUESTION:   Is the point of your argument  
18   ultimately -- you're not saying this, but I mean, if we  
19   accept the way you're going, are we really going down the  
20   road to saying, look, at some point we've got to leave  
21   this in a less protean state, and we've got to pick a  
22   number, and is that our business to do?

23                  MS. BIRNBAUM   Now, we're not asking you to put  
24   a bright line. It would be helpful, but I don't think  
25   this Court is prepared to do that.

1                   QUESTION: Well, would the bright line be  
2 helpful if we said, up to -- pick a number -- 10 times  
3 will be usually accepted unless that is not adequate  
4 enough to compensate the plaintiff for the wrong that was  
5 done to him?

6                   MS. BIRNBAUM That would be an excellent way of  
7 drawing the line, Your Honor.

8                   QUESTION: You get this out of what provision of  
9 our Bill of Rights?

10                  MS. BIRNBAUM Your Honor, we get it out of due  
11 process, the two bedrock provisions called due process and  
12 federalism. Federalism, comity, States' rights.

13                  QUESTION: But as far as --

14                  QUESTION: It's not specific, is it? 10 times  
15 is what it says.

16                  MS. BIRNBAUM No, we're not suggesting that. I  
17 thought it was a good idea, however.

18                  (Laughter.)

19                  QUESTION: Ms. Birnbaum, I'd like you to clarify  
20 your position on what has been called  
21 extraterritoriality --

22                  MS. BIRNBAUM Yes, Your Honor.

23                  QUESTION: -- because I thought today that you  
24 were very forthright with the Court. You said no, you're  
25 not going to make a distinction whether the plaintiff

1 comes from California or New York rather than Utah.

2 MS. BIRNBAUM Right.

3 QUESTION: So you can't just draw a line around  
4 the State of Utah and say, that's the relevant State. But  
5 you tell us a supplemental brief was calling attention to  
6 a case where there was a specific request to make that  
7 kind of charge. You made no such, State Farm made no such  
8 request in this case, as far as I can tell.

9 MS. BIRNBAUM Yes, they did, Your Honor.

10 QUESTION: Yes? Where?

11 MS. BIRNBAUM Well, it might not have been  
12 totally the same that --

13 QUESTION: Which one?

14 MS. BIRNBAUM It's in the lodging at 394. It  
15 was instruction number 46.

16 QUESTION: Yes, and instruction number 46, which  
17 I looked for, was the closest thing.

18 MS. BIRNBAUM That's right --

19 QUESTION: That talks about both compensatory  
20 and punitive damages, that you should base it on State  
21 Farm's conduct in handling of the case against Curtis  
22 Campbell.

23 MS. BIRNBAUM Right.

24 QUESTION: Only.

25 MS. BIRNBAUM Right.



1                   QUESTION: Now, that's not even saying other  
2 people within Utah. So that's -- and it's alike for  
3 compensatory and punitive. That is nothing like the  
4 charge that said, look in the State of Nevada. But I just  
5 wanted to make sure that you are saying, you don't look  
6 only to Utah, because this particular plaintiff happened  
7 to come to Utah. It would be the same thing if the  
8 plaintiff came from California.

9                   MS. BIRNBAUM Absolutely, Your Honor.

10                  Let me just mention one other part of the  
11 guideposts which I think are very relevant here, and that  
12 is comparable penalties for comparable misconduct, and  
13 here it is uncontroverted that the penalty that the Utah  
14 courts or the Utah system could have placed on State Farm  
15 for an act, for a single act of bad faith failure to  
16 settle, which was at stake here, was \$10,000.

17                  Yet when the Utah Supreme Court examined that  
18 guidepost from the Court, it looked at the scheme. It  
19 looked at all of the nationwide conduct to determine that  
20 1) you could be -- you would have to disgorge all your  
21 profits or you could be imprisoned, which was not correct  
22 anyhow under the Utah statute.

23                  But if you restate the guideposts that you have  
24 already come down with, and you make it clear that we're  
25 talking about conduct that was permitted to the

1 plaintiffs, that we're talking about reasonable ratios  
2 that had to do with the plaintiff's wrong, not harm to  
3 others, not harm to all of those in Utah -- in fact, if  
4 you look at the bad faith failure to settle issue, there  
5 was no one in the State of Utah that was harmed by that  
6 kind of conduct. There was nobody that was even subject,  
7 Justice Breyer, for a short time with execution, and  
8 that -- and there was no reason, there was no reason to  
9 deter that kind of conduct because there was no conduct in  
10 the future, after the Campbell case, that that even came  
11 close to.

12           So I think that if you focus on those factors,  
13 those guideposts that you elucidated to in Gore, and make  
14 them stronger, that would be sufficient for the lower  
15 courts to do their job in doing a meaningful -- meaningful  
16 appellate review, not the kind of review there that was  
17 based on questionable conclusions and improper predicates.

18           Thank you.

19           QUESTION: Thank you, Ms. Birnbaum

20           Mr. Tribe, we'll hear from you.

21           ORAL ARGUMENT OF LAURENCE H. TRIBE

22           ON BEHALF OF THE RESPONDENT

23           MR. TRIBE: Justice Stevens, and may it please  
24 the Court:

25           I think I might begin by saying that I barely

1 recognize the case that, though I didn't try, I read the  
2 transcript in, from hearing Ms. Birnbaum's description.  
3 She says that the conduct involved in this case was simply  
4 the failure to settle. It wasn't, she says, even an  
5 intentional tort. Well, the Court's --

6 QUESTION: Well, that was the sole ground of  
7 liability, was it not?

8 MR. TRIBE: The sole ground of original  
9 liability was objectively unreasonable failure to settle,  
10 but phase 2, which was held at the insistence of  
11 plaintiffs, who wanted -- of the defendants who wanted to  
12 bifurcate, phase 2 focused on the question of whether  
13 there was an intentional tort, and there was found to be  
14 fraud; and the court, the trial court affirmed the  
15 judgment partly on the ground of intentional fraud; and  
16 the fraud, and it's not a surprise really to the lawyers  
17 for the defendants, because they made it clear in their  
18 opening statement that they understood the whole theory of  
19 this case to be that the insurance policies that were  
20 being sold by State Farm, which led people to think that  
21 in first and in third party cases the claims adjuster  
22 would try to do a reasonably objective job of satisfying  
23 the claim if possible, in fact weren't bad at all.

24 There was a clandestine cap that was imposed by  
25 this innocuous-looking bureaucratic PP&R program that was

1 thoroughly documented and that was imposed from  
2 headquarters, documented elaborately by hundreds of  
3 examples; and it's true, some of them came from other  
4 States, and I will get to that; but they were all just  
5 illustrative, because it came from headquarters in  
6 Bloomington, and it was a directive --

7 QUESTION: I take it the policy is, pay as  
8 little as possible, even if fraud is necessary?

9 MR. TRIBE: And, in fact, it was necessary here.  
10 That is, they made up things. They doctored the file.

11 QUESTION: All right, I see that, but what's --

12 MR. TRIBE: They made up the fact that -- they  
13 defamed this dead person and said that he was speeding to  
14 meet a pregnant girlfriend, who didn't exist. There were  
15 findings that they systematically shredded, and destroyed,  
16 and fabricated documents for two decades in order to cover  
17 up the fact that they were not selling what they were  
18 pretending to sell.

19 And it was found in this case clearly, and then  
20 again de novo by the Utah Supreme Court, that this policy,  
21 which was clandestine and then covered up, was a policy  
22 that had persisted for two decades, which they even now  
23 seem unwilling to acknowledge.

24 QUESTION: Can I interrupt with a question?

25 MR. TRIBE: Sure.

1                   QUESTION: I'm sure you're going to get to it,  
2 but one can infer -- maybe it's not entirely clear -- that  
3 all of this was established, and there are very, very  
4 many, many bad, bad deeds done in all parts of the United  
5 States, but that the \$145 million is in large part  
6 punishment for what was done outside of Utah.

7                   MR. TRIBE: Oh, I don't think so, Justice  
8 Stevens. I do plan to get to that.

9                   QUESTION: The second point that relates to that  
10 is that when the Supreme Court of Utah made the comparison  
11 to what the criminal penalty might have been, they had to  
12 be referring to more than what could have been imposed in  
13 Utah.

14                  MR. TRIBE: No, Justice Stevens, what they said  
15 was this. They referred among other things to the Utah  
16 Unfair Claims Practices Act, which said \$10,000 fine per  
17 violation; and there were in their view thousands of  
18 individual instances of wrongfully denied benefits.

19                  QUESTION: In Utah?

20                  MR. TRIBE: In Utah, yes, because they didn't  
21 draw this fancy distinction between first and third party  
22 claims that is being drawn for the convenience of State  
23 Farm. The wrong is not --

24                  QUESTION: That's the basis of the underlying  
25 tort, which was the failure -- which was the excess.

1                   MR. TRIBE: That was the example --

2                   QUESTION: Which was the excess.

3                   MR. TRIBE: -- Justice Kennedy. That was the

4 tip of the iceberg.

5                   Justice Kennedy, this is very important. In

6 this particular case, it was the failure to settle a case,

7 and it was a fraudulent failure to settle a case, not just

8 a random accident, but it was pursuant to exactly the same

9 policy, capping the average amount that a given claims

10 agents puts out in terms of State Farm money, that is used

11 in these other instances. It was exactly the same policy.

12                   In this case, it was because this fellow named

13 Bill Brown wanted to move to Colorado, and because he did,

14 and because he was close to his quota, and this is all in

15 the record, and it is found -- and it's not disputed any

16 longer. Because he wanted to move to Colorado, he puts

17 pressure on somebody underneath him to make sure that that

18 year's numbers look better.

19                   QUESTION: Of course, companies would have a

20 policy of trying to make as much money as possible.

21                   MR. TRIBE: It's not just making as much

22 money --

23                   QUESTION: Well, some companies could add --

24                   MR. TRIBE: -- it's stealing.

25                   QUESTION: -- could add to that, by the way, one

1 way we make money is, we pay out as little as possible and  
2 we charge as much as possible. I remember an airline that  
3 had the policy, charge the customer the highest price he  
4 will pay for the service that he wants, all right?

5 MR. TRIBE: But Justice Breyer --

6 QUESTION: There could be such a policy.

7 MR. TRIBE: Right --

8 QUESTION: Now --

9 MR. TRIBE: -- and if the policy is sell him a  
10 ticket and then turn him away at the door --

11 QUESTION: Oh, no, no, but by the way --

12 MR. TRIBE: -- pretending to sell him a place --

13 QUESTION: -- it might be that such a policy  
14 would even condone doing a lot of bad things to do that,  
15 and what's worrying me about permitting that kind of  
16 policy to serve as a justification for a \$145-million  
17 judgment is precisely what I wrote in my concurrence in  
18 the BMW case, that the Constitution, indeed the Magna  
19 Carta says that you should not take life, liberty, or  
20 property without law; and to take 12 people, call them a  
21 jury, selected at random, and tell them that they are free  
22 to go through the business practices of a company --

23 MR. TRIBE: Justice Breyer --

24 QUESTION: -- to unite them under the name of a  
25 policy and then assess \$145 million for every bad thing

1     that this jury thinks --

2                   MR. TRIBE:   Justice Breyer, please -- I believe  
3     in the Magna Carta as much as you do.   It was not  
4     arbitrary.   There were criteria.   The criteria were  
5     pursuant to an instruction proposed by State Farm, and in  
6     this case it was not every bad thing.   All of the  
7     specifics, including these seemingly trivial things like  
8     appearance allowances, were all introduced in particular  
9     cases to show how they were being used by someone who was  
10    up against his monthly quota, and because he was up  
11    against the monthly quota -- you read the testimony of  
12    Gary Fye at page 1375 and 1387 of the joint appendix.  
13    Because they were up against the monthly quota, the people  
14    at the receiving end who thought they had a claims agent  
15    who was, as they call him, a good neighbor, in fact had  
16    someone who was selling them a place in the airline, and  
17    it wasn't there, deliberately.

18                  QUESTION:   Nothing you have said, Mr. Tribe,  
19    Professor, persuades me that the jury didn't punish this  
20    company for being a bad company quite without reference --

21                  MR. TRIBE:   Because of the --

22                  QUESTION:   -- to the harm this plaintiff  
23    suffered.

24                  MR. TRIBE:   Well, first of all, as to the harm  
25    suffered, proposed instruction 40 by State Farm would have



1 told the jury, I think consistent with this Court's  
2 jurisprudence and with the history of punitive damages,  
3 that they could consider the effect of State Farm's  
4 behavior, quote, "on the lives of plaintiffs and of other  
5 policyholders," and it's because, Justice Breyer, of what  
6 you said in BMW that a lot of other people who are harmed  
7 by these practices are not likely to be able to sue. That  
8 is, they're not going to make it.

9 Mr. Fye testified at 30 and 44, for everyone  
10 like Campbell, who will take on a company the size and  
11 with the resources of State Farm, there are hundreds, if  
12 not thousands, who will simply go away, because State  
13 Farm --

14 QUESTION: Mr. Tribe, maybe fewer, maybe fewer  
15 now after a verdict of that size, and isn't that one of  
16 the problems?

17 MR. TRIBE: Well, that's the hope. That --

18 QUESTION: Isn't that -- now there's an  
19 incentive for lawyers to pursue such claims. Before they  
20 might have thought them too small to be worthwhile.

21 MR. TRIBE: One of the advantages -- there may  
22 be down sides, but if we prevail, Justice Ginsburg, we're  
23 prevailing on a theory that the practice we've identified,  
24 which is quite specific, for 20 years of putting these  
25 invisible caps that cheat the insured in all kinds of

1 cases throughout the State of Utah, there will no longer  
2 be anyone who can recover for those harms, beyond  
3 compensatory damages, because the penalty will have been  
4 extracted.

5 QUESTION: The question that's bothering me --

6 QUESTION: Is that true in New York or Vermont?  
7 I mean, you said in Utah there would be no one who can get  
8 another \$145 million --

9 MR. TRIBE: I think if they've done this in  
10 every State, then they should be exposed to the  
11 possibility of punitive damages in other States.

12 QUESTION: So you could multiple that by 50.

13 MR. TRIBE: Well, you know, it seems to me, if  
14 you look at the opinion that was delivered from the bench  
15 by the district court after 2 months, in his own words --  
16 they accuse us of writing his opinion.

17 In his own words, what he said was that absent a  
18 punitive award, the problem of recurrence of their  
19 misconduct is extremely high, the probability of  
20 recurrence; because he saw the evidence that they never  
21 stopped; and he said that even the \$25-million award that  
22 he felt constrained by State law, mistakenly, to give, he  
23 thought would not suffice because -- and I'm now reading  
24 from his December 19 opinion -- because the \$25 million  
25 may not be enough to offset the profit that they're likely

1 to have earned.

2 That is, every time they cheat the insured by --

3 QUESTION: Mr. Tribe, you've told me that this  
4 is all based on what happened in Utah. I haven't read  
5 this massive record, and you tell me you have. In the  
6 second phase of the punitive damages trial, not the first  
7 one --

8 MR. TRIBE: Yes.

9 QUESTION: -- when they did get into out of  
10 State evidence, what proportion, in your judgment, of that  
11 evidence related to Utah, and what proportion related to  
12 other States?

13 MR. TRIBE: I think the overwhelming majority  
14 related to Utah, and every time it came in dealing with  
15 another State, contrary to what we heard, it was because  
16 the door had been opened, and it was specifically found by  
17 the trial court that they waived any objection to the  
18 testimony in question, despite what we heard about --

19 QUESTION: But you're telling me that over half  
20 of the evidence related to Utah itself?

21 MR. TRIBE: Yes, but let me tell you, Justice  
22 Stevens, it was so uniform that the particular examples  
23 were picked because they so nicely illustrated the way a  
24 particular device like the use of non-OPM parts would  
25 interact with the cap that was imposed. It was nothing

1 about --

2 QUESTION: Are they correct in telling us that  
3 this -- there's only one example of a failure to settle --

4 MR. TRIBE: We have no way of knowing, Justice  
5 Stevens, because they have erected -- the record also  
6 shows that since the 1970s, part of their policy of  
7 destroying records has included --

8 QUESTION: Yes, but there must have been a lot  
9 of records --

10 MR. TRIBE: -- getting rid of all those records.

11 QUESTION: But they didn't destroy all the  
12 evidence to have a trial go on this long.

13 MR. TRIBE: Well, it's because -- part of what  
14 was said by the trial court was that it took the  
15 persistence of a David to bring this particular Goliath to  
16 his knees. Much of the evidence certainly wasn't produced  
17 through discovery. The key evidence, including the May  
18 1979 PP&R report, was obtained indirectly through other  
19 cases, not with any cooperation on the part of State Farm.  
20 State Farm kept saying, we don't have a PP&R policy. Oh,  
21 and then we got rid of it in 1992; and we got rid of it  
22 again in 1994; and yes, there's a PP&R policy, but it  
23 doesn't actually set the cap on any particular claim.

24 Well, that's a nicely and artfully put point.  
25 It doesn't. What it does is, it imposes a ceiling which

1 averages things out and forces whoever is unlucky enough  
2 to come in when somebody is about to hit his ceiling to  
3 get cheated. It seems to me that we -- it's true that it  
4 all began by looking at this, as it happened, failure to  
5 settle. That's a happenstance. It could have begun in  
6 some other way.

7           Because it happened to a couple that was rather  
8 vulnerable, and yet tenacious: this fellow had had one  
9 wife who had been murdered in his home, another wife who  
10 had died of cancer. He himself had Parkinson's disease.

11           They were part of the weakest of the herd, as  
12 State Farm's policies put it, that they're picked on,  
13 because they're less likely to fight back. But it happened  
14 that these people did fight back, and it seems to me it's  
15 not a matter of rewarding them. They get a relatively  
16 small piece of this. The family of the dead young man  
17 gets part of it. The State may get part of it. The key  
18 point is that it is a critical disincentive, and Justice  
19 Kennedy, any notion --

20           QUESTION: Well, some people get part of it that  
21 weren't hurt at all.

22           MR. TRIBE: Some lawyers will certainly get part  
23 of it. I don't --

24           QUESTION: I wasn't referring to the lawyers.

25           MR. TRIBE: I --

1 (Laughter.)

2 MR. TRIBE: What made me think you might have  
3 been? No, but it seems --

4 QUESTION: Well, I was referring to the other  
5 people that took an assignment of the claim together with  
6 --

7 MR. TRIBE: That could be, but --

8 QUESTION: I was referring to them, and my  
9 problem is that in fact what you have is a system where if  
10 you take, let's call it the most evil corporation in the  
11 world, and I'm sure there are some such, and they commit a  
12 very minor tort in respect to someone, pursuant to their  
13 policy of being evil --

14 (Laughter.)

15 QUESTION: -- and it seems to me that there are  
16 criminal laws, there are regulatory authorities, there are  
17 statutes --

18 MR. TRIBE: Right.

19 QUESTION: -- there is common law, there are  
20 many, many sources of law; and it's disturbing in terms of  
21 the picture of the law to have 12 people picked at random  
22 to assess an enormous fine without standards other than,  
23 "this defendant is evil," and I'm assuming he is evil.

24 MR. TRIBE: Justice Breyer, first, it's not fair  
25 to say that was the only standard.

1 QUESTION: Oh, no, I'm trying --

2 MR. TRIBE: Second -- second --

3 QUESTION: -- to get you to say what the

4 standard was, if it is not that.

5 MR. TRIBE: I thought this Court did a rather

6 good job in BMW. Reprehensibility could hardly be higher

7 when one has a repeat offender who even now

8 mischaracterizes its intentional tort, when one has a

9 repeat offender that obstructs justice --

10 QUESTION: But again, you're defining

11 reprehensibility quite without regard to the specific

12 injury imposed on the plaintiff.

13 MR. TRIBE: Well --

14 QUESTION: You're defining -- you're giving a

15 report card to the entire company.

16 MR. TRIBE: No, but Justice Kennedy, in TX0 this

17 Court talked about the ratio not just of the harm that

18 actually befell the particular plaintiff, but of the

19 punitive damages to the harm that might have befallen that

20 plaintiff if the tortious plan had been carried to

21 completion.

22 Here, if it had been carried to completion the

23 home would have been taken, because a deal would not have

24 been struck in December of '84 -- of '84, and also in TX0,

25 and in other cases, you've spoken of the harm to the

1 larger community. You've also spoken of the importance of  
2 extracting the profit from tortious behavior.

3 QUESTION: I think -- Justice Breyer touched on  
4 this. Part of the harm to the larger community here is  
5 the image that this does to the judicial system when  
6 corporations, businesses, people of substance want to use  
7 the courts and they're deterred from doing it by the  
8 threat of runaway punitive damages, and that is not good  
9 for the legal system.

10 MR. TRIBE: Justice Kennedy, I certainly agree  
11 in principle; but to pick a case in which a corporation  
12 has defied the legal system, has shredded documents, has  
13 covered up its deliberate wrongdoing, has not even  
14 bothered to pay attention to a \$100 million award -- yes,  
15 of course it wasn't reduced to a judgment, but the  
16 evidence in this case is that that's not relevant. What  
17 was critical is that they had built a wall of deniability  
18 so that no one in a decisionmaking capacity is informed of  
19 punitive judgments.

20 Mr. Muskowski testified in this case that he  
21 would not let anyone know, in a position of authority,  
22 even of the punitive judgment in this case; and in their  
23 reply brief they say, well, Mr. Mendoza had decisionmaking  
24 authority, but if you look at the relevant pages in the  
25 joint appendix, you'll see that that's not true. In the



1 colloquy it's clear that he did not.

2           What that means is that a company can surround  
3 itself with an impregnable wall and in effect spit at the  
4 legal system. How good is that for its image?

5           Now, it may be that an ideal legal system might  
6 not use juries for this purpose, but is it the mission of  
7 this Court to redesign the legal systems of the 50 States?  
8 15 States have signed an amicus brief here saying it's  
9 important to them to be able to use punitive damages when  
10 the regulatory and criminal justice systems haven't quite  
11 caught up with whatever latest axis of evil is afoot in  
12 the corporate world.

13           Is it really helpful to any of us to have a  
14 corporation be able to defraud all of the people who rely  
15 on it, who depend on it, and get away with paying simply  
16 what harm they happened to cause in the one case when they  
17 get caught?

18           It seems to me especially bizarre, especially  
19 bizarre for State Farm to speak here proudly of the fact  
20 that this is the worst case in history.

21           QUESTION: Can I ask one other question just  
22 about the proceedings here?

23           MR. TRIBE: Yes.

24           QUESTION: The record is so large I didn't have  
25 the whole thing completely in mind. After the trial judge

1 reduced the jury's award of \$145 million to -- what was  
2 it, \$20 million?

3 MR. TRIBE: 25.

4 QUESTION: -- \$25 million, State Farm still  
5 appealed.

6 MR. TRIBE: There was a cross-appeal by State  
7 Farm.

8 QUESTION: Well, did both sides appeal that?

9 MR. TRIBE: Yes.

10 QUESTION: I see. It wasn't clear to me.

11 MR. TRIBE: That's right. State Farm appealed  
12 because it thought there should be no punitives. It seems  
13 even now they think it did nothing wrong.

14 QUESTION: Yes.

15 MR. TRIBE: And there was a cross-appeal by the  
16 Campbells on the grounds that they thought it was a  
17 mistake of State law to have reduced the punitives.

18 QUESTION: I was thinking it would have been  
19 quite a shock if State Farm had been the only appellant  
20 here and that was the result of that appeal.

21 MR. TRIBE: Yes.

22 QUESTION: It's sort of dramatic, yes.

23 MR. TRIBE: Yes, well --

24 QUESTION: Both sides appealed.

25 MR. TRIBE: Yes, that's correct.

1                   QUESTION: And isn't there a certain irony in  
2 that it was chopped down to \$25 million, and then the Utah  
3 Supreme Court, using this Court's case law, saying we  
4 don't give the ordinary deference that we would give to  
5 that judgment of the trial court, because the Supreme  
6 Court had told us we must engage in de novo review, and  
7 engaging in de novo review, we don't chop it down, we put  
8 it back to where it was originally.

9                   MR. TRIBE: Well, Justice Ginsburg, I think in a  
10 sense that looks ironic. It looks as though Cooper v.  
11 Leatherman came back in a boomerang, but I think really  
12 the way I read the opinion of the Utah Supreme Court, they  
13 applied Cooper in an even more vigorous way in general.  
14 That is, they didn't just engage in de novo review of the  
15 question of excessiveness. They engaged in de novo review  
16 of all the factors, so you have not just a jury, but a  
17 jury and a trial court and a full appellate court.

18                   The only fact on which they said they weren't  
19 going to defer was a technical issue about the wealth of  
20 State Farm, and the real reason they actually gave for  
21 increasing the 25 to 145 was their conviction that the  
22 trial court believed that 25 would not stop State Farm  
23 from persisting in its practices, and that it was only  
24 their own earlier suggestion that the ratio should matter  
25 a great deal that had misled the trial court.

1                   QUESTION: What do you think the ratio should --  
2 I mean, we did say something in BMW about ratio between  
3 compensatory damages and punitives. What do you think the  
4 ratio should be? No limit, 10 to, 145 -- whatever it  
5 takes to stop them? I mean, what if nothing will stop  
6 them but sending them to jail?

7                   MR. TRIBE: Well, in this case, sending them to  
8 jail was an option that the Supreme Court of Utah  
9 mentioned, and that State Farm doesn't seem to take very  
10 seriously. They think the State Supreme Court of Utah  
11 doesn't understand its own law. There are provisions of  
12 Utah law that make deliberate fraud of the sort they  
13 committed an imprisonable offense, and maybe that's an  
14 option, but that suggests --

15                  QUESTION: You mean, you could right in this  
16 case put people in prison for --

17                  MR. TRIBE: Well, I haven't -- I have no contact  
18 with the Attorney General of Utah, but they --

19                  QUESTION: No, no, I mean, you'd have to bring  
20 another trial, wouldn't you?

21                  MR. TRIBE: Well, of course you -- yes. Yes,  
22 but the comparability standard asks, how serious an  
23 offense is this, and I submit it's extremely serious.

24                  But to your question, Justice Scalia, on ratio,  
25 I think that instead of trying to come up with a number --

1 because I think suggesting any number would be so  
2 arbitrary that it would do more damage to this Court than  
3 good to the legal system. It's not like 6 months for the  
4 idea of a serious crime. I mean, it would just be a  
5 number plucked from the air, and it would backfire,  
6 because as the law and economics people are fond of  
7 pointing out, any number you pick will then lead people to  
8 sort of modify their behavior accordingly, and just  
9 internalize the costs on a kind of bad man theory, and  
10 what you really are trying to do is stop the behavior.

11 We're not talking about negligence here. We're  
12 talking about something of which the optimal level is  
13 zero. The optimal level of deliberate fraud and deception  
14 covered up in this way is zero.

15 The relevance of the ratio, I think, is simply  
16 as one thing to look at. If the ratio looks very high,  
17 you ask why is it so high? In this case, the answer comes  
18 back, it's so high because the ratio of the number of  
19 people they hurt to the number who are going to be  
20 motivated to sue and able to sue is very low. I mean, is  
21 very -- you know, a number -- a huge number will be hurt.  
22 A very small number are going to be able to make it  
23 through that filter.

24 QUESTION: Well, with verdicts like this, we  
25 might see an increase, don't you think?

1                   MR. TRIBE: Well, I suppose. I suppose, but  
2 there are ways of getting rid of frivolous lawsuits.

3                   The point also is, it's hard -- if you see an  
4 increase, Justice O'Connor, and if it is an increase that  
5 gets anywhere, it might be because they stopped destroying  
6 the evidence, because they stopped fabricating -- they've  
7 so doctored the files, like the file in this case, to make  
8 it look in any given case as though the report that they  
9 give corresponds to the history of the case, and it's  
10 awfully hard to sue successfully when the file has been  
11 massaged and doctored.

12                  The result in a case like this is of course it  
13 looks like a very large award, but --

14                  QUESTION: What if there were in Utah a second  
15 Campbell, a second excess carrier, and the case was tried  
16 6 months later. Would they get the same punitive damages?

17                  MR. TRIBE: No. If it was for any activity that  
18 occurred during the period from May 1979 to the time of  
19 this trial --

20                  QUESTION: Both hypothetical plaintiffs are  
21 injured around the time Campbell is, and they both bring  
22 the same kind of suit and they have the same evidence;  
23 they each get the 145?

24                  MR. TRIBE: No. I think that it's a penalty  
25 that is like -- there ought to be some double jeopardy

1 like doctrine that if they can show that they've already  
2 been punished for this course of conduct, they ought not  
3 to have to pay the penalty a second time.

4 Now, the Double Jeopardy Clause --

5 QUESTION: Mr. Tribe, I thought you answered --

6 QUESTION: What's the authority for that  
7 proposition?

8 MR. TRIBE: I would -- I just made it up.

9 (Laughter.)

10 QUESTION: Professor Tribe.

11 MR. TRIBE: I just made it up. I said there  
12 ought to be such a doctrine.

13 QUESTION: Mr. Tribe, you're talking about a  
14 second Utah plaintiff. I thought you answered --

15 MR. TRIBE: Yes, a second --

16 QUESTION: Several questions ago you said this  
17 could be multiplied at least 50 times. That is, one big  
18 winner in each State.

19 MR. TRIBE: Well, if they commit 50 big  
20 offenses, it's part of our jurisprudence of 50 States that  
21 they might be subject to 50 penalties. That --

22 QUESTION: Your argument is that this is all  
23 Utah damages, so there are --

24 MR. TRIBE: That's right. That's --

25 QUESTION: -- 49 other claims out there that

1 must be at least as valuable.

2 MR. TRIBE: Well, that's right.

3 QUESTION: Yes.

4 QUESTION: And even in Utah, I thought our case  
5 says you're punishing them for the harm done to this  
6 plaintiff.

7 MR. TRIBE: Ultimately, you are.

8 QUESTION: If you can take reprehensibility into  
9 account, but it's for the harm done to -- well, what about  
10 the harm done to all the other plaintiffs in Utah?

11 MR. TRIBE: Justice Scalia, there's no pretense  
12 that this is compensatory damages. The compensatory  
13 damage compensates them for the harm done to them

14 QUESTION: Then you shouldn't have said that.

15 MR. TRIBE: Then the reprehensibility of what  
16 was done to them is affected by, as this Court has said,  
17 whether it was an isolated event, as they claimed, or  
18 whether it was done as part of a schematic, systematic  
19 form of predation.

20 Now, it was of that sort. That was shown. The  
21 fact that it was predation that was launched from  
22 Bloomington and therefore spread throughout the country is  
23 State Farm's problem. It shouldn't be the problem of the  
24 plaintiff who collects punitive damages in a given case.

25 QUESTION: Mr. Tribe, I can't remember -- I



1     assume it's in the briefs, I just don't remember, what was  
2     the instruction to the jury on any limits on their  
3     consideration of the out-of-State evidence? Was the jury  
4     told, look, you can only punish them for what they did  
5     here, this only goes to intent, or something like that?

6                 MR. TRIBE: There was no request here, as there  
7     was, for example, in the recent Ninth Circuit case against  
8     Ford, no request whatsoever by State Farm for such an  
9     instruction.

10                What they did request, and were not entitled to,  
11     was that under BMW they preserved an objection that the  
12     out-of-State evidence be completely disregarded, even  
13     though it came in in response to the doors that they had  
14     opened, but they did not --

15                QUESTION: But the objection never eventuated in  
16     a request for an instruction --

17                MR. TRIBE: Not at all.

18                QUESTION: -- or in instruction addressing  
19     specifically that point?

20                MR. TRIBE: No, and they were fully aware -- I  
21     mean, the day after BMW came down, there was a bench  
22     conference. There was an extended colloquy. It was  
23     fully --

24                QUESTION: But wasn't that after the trial? I  
25     thought that was in the petition for reconsideration?

1                   MR. TRIBE: No. The -- May 21, 1996 was before  
2 the full-blown 2-month period of the phase 2 trial.

3                   QUESTION: I see.

4                   MR. TRIBE: And it was known very clearly the  
5 day after BMW that a good bit of the evidence in this  
6 case, because many of the examples of how this policy  
7 worked, would come from other places, would not be Utah-  
8 based. The \$100-million verdict which would illustrate  
9 the wall they built would come from Texas.

10                  They never once asked for an instruction  
11 limiting matters to Utah, and I don't fault them for it.  
12 It would have been rather bizarre to do so, because they  
13 knew full well that we were not asking the Utah jury or  
14 the Utah courts to punish them for what they did  
15 elsewhere.

16                  We were simply using what was done elsewhere  
17 first to rebut their commissioners -- they brought in  
18 commissioners from various States to testify that State  
19 Farm never did anything wrong. The trial court said, now  
20 you know, if you do that, you're going to open the door --  
21 Justice Stevens, I wanted to just -- if you do that,  
22 you're going to open the door to proof of what happened  
23 elsewhere. They didn't mind, and they insisted that the  
24 sequence of proof be rebuttal first, actually, through  
25 depositions, and then the principal arguments, which made

1 it look as though it was part of the direct case. I think  
2 that --

3 QUESTION: Thank you, Mr. Tribe.

4 MR. TRIBE: -- this judgment should be affirmed.  
5 Thank you.

6 MS. BIRNBAUM Do I have a little time, can I  
7 just -- left to respond?

8 QUESTION: You have about --

9 MS. BIRNBAUM Two minutes?

10 QUESTION: You have, I think, a minute and a  
11 half -- but let's make it two and a half.

12 REBUTTAL ARGUMENT OF SHEILA L. BIRNBAUM

13 ON BEHALF OF THE PETITIONER

14 MS. BIRNBAUM Thank you, Your Honor, I  
15 appreciate that, because there are certain things that Mr.  
16 Tribe said that I think we have to clarify.

17 First of all, this case, on the openings of the  
18 plaintiff, the plaintiff said to the jury, this case  
19 transcends the Campbells' file. It involves a nationwide  
20 practice. He went on to say, you're going to be  
21 evaluating and assessing and hopefully requiring State  
22 Farm to stand accountable for what it is doing across the  
23 country. That is the purpose of punitive damages.

24 On the summation, they asked this jury to act as  
25 a national regulator, because none of the regulators had

1 acted against State Farm Can you imagine, in a 14 -- in  
2 a 20-year period, State Farm handled approximately 280  
3 million claims.

4 QUESTION: What limiting instruction did you ask  
5 for?

6 MS. BIRNBAUM The only instruction, Your Honor,  
7 was the instruction that I previously read to Justice  
8 Ginsburg that they should look to the conduct toward the  
9 Campbells, and that was the instruction. There was no  
10 other instruction.

11 But whether there was an instruction or not, I  
12 think as the Ninth Circuit just said in *White v. Ford*, you  
13 have to look at the evidence, the openings, the closings,  
14 and what was punished here. It was a scheme, and the  
15 scheme had no causal relationship with the decision to try  
16 this case.

17 You asked, Justice Stevens, how much of the  
18 evidence was extraterritorial? Huge amounts, and it came  
19 in on direct, and we have it cited in our brief, and it  
20 wasn't only --

21 QUESTION: Do you disagree with Mr. Tribe's  
22 suggestion that over half the evidence related to Utah?

23 MS. BIRNBAUM No, Your Honor. It related to  
24 Mr. Campbell's underlying case, not to actions in Utah  
25 that harmed Utah policyholders. That was all inferred

1 from this large national scheme. In fact, the evidence is  
2 contrary.

3 QUESTION: You're saying the Utah evidence was  
4 evidence relating to this particular case --

5 MS. BIRNBAUM Absolutely.

6 QUESTION: -- rather than to other Utah  
7 policyholders.

8 MS. BIRNBAUM And if you look at the footnote  
9 in their brief, and look at our reply brief, we point out  
10 all of that evidence had to do with the underlying case.  
11 The lawyers from the underlying case, Mr. Campbell, Mrs.  
12 Campbell, Ospital, Slusher et cetera, and this issue of  
13 whether there was one, whether this -- Mr. Campbell was  
14 vulnerable, Mr. Campbell was the only person in this whole  
15 trial that wasn't vulnerable. He was a 60-year-old white  
16 man and who had a B.A. and an M.A. He sat through the  
17 entire trial and he said he was not liable, and the  
18 decision was made that this was a no liability case.

19 Mr. Tribe says Ospital was not speeding --

20 JUSTICE STEVENS: Thank you, Ms. Birnbaum.

21 MS. BIRNBAUM Thank you so much.

22 JUSTICE STEVENS: I think we've got your  
23 position.

24 The case is submitted.

25 (Whereupon, at 12:06 p.m., the case in the

1   above-entitled matter was submitted.)  
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